fraudulent intent. And the third approach--the approach petitioners espouse--requires the government to prove that the false representations would deceive persons of ordinary prudence.

Remarkably, none of the courts of appeals to address this hotly disputed issue has examined the common law of fraud, as this Court's analysis in *Neder* and *Pasquantino* requires. As we demonstrate in Part II below, that analysis points strongly toward adoption of the third approach.

I. THE COURT SHOULD GRANT THE WRIT TO RESOLVE THE SPLIT IN THE CIRCUITS OVER THE "ORDINARY PRUDENCE" ELEMENT OF THE MAIL AND WIRE FRAUD STATUTES.

The courts of appeals are sharply divided over the "ordinary prudence" element of the mail and wire fraud statutes. The Court should grant the writ to resolve the split in the circuits and to establish uniformity for the hundreds of mail and wire fraud cases brought each year nationwide.

The split over the "ordinary prudence" element runs three ways. The First, Fourth, Ninth, and District of Columbia Circuits reject the element entirely.[3] The Second and Tenth Circuits, and some panels of the Third, Fifth, Seventh, and Eleventh Circuits, recognize the "ordinary prudence" element, but--like the courts below in this case--decline to apply it literally. These courts view the ability of the false representations to deceive persons of ordinary prudence as relevant to the defendant's intent. They do not

[3] *See, e.g., United States v. Brien*, 617 F.2d 299, 311 (1st Cir. 1980); *United States v. Colton*, 231 F.3d 890, 903 (4th Cir. 2000); *United States v. Ciccone*, 219 F.3d 1078, 1083 (9th Cir. 2000); *United States v. Hanley*, 190 F.3d 1017, 1023 (9th Cir. 1999); *United States v. Maxwell*, 920 F.2d 1028, 1036 (D.C. Cir. 1990).

permit consideration of the alleged victim's diligence.[4] The Sixth Circuit (except in this case), the Eighth Circuit, and some panels of the Third, Seventh, and Eleventh Circuits apply the "ordinary prudence" element by its terms, to exclude from the scope of the mail and wire fraud statutes false representations that no reasonably prudent person would accept without further inquiry.[5]

These disparate approaches reflect profound differences over the scope and role of criminal law--and especially federal criminal law--in modern society. Proponents of the first and second approaches outlined above contend that application--or at least literal application--of the "ordinary prudence" element "would invite con men to prey on people of below-average judgment or intelligence, who are anyway the biggest targets of such criminals and hence the people most needful of the law's protection." *United States v. Coffman*, 94 F.3d 330, 334 (7th Cir. 1996); *see, e.g., United States v. Hanley*, 190 F.3d 1017, 1023 (9th Cir.

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[4] *See, e.g., United States v. Thomas*, 377 F.3d 232, 241-43 (2d Cir. 2004); *United States v. Coyle*, 63 F.3d 1239, 1243-44 (3d Cir. 1995); *Blachly v. United States*, 380 F.2d 665, 671-72 & n.13 (5th Cir. 1967); *United States v. Masten*, 170 F.3d 790, 795-96 (7th Cir. 1999); *United States v. Coffman*, 94 F.3d 330, 333-35 (7th Cir. 1996); *United States v. Drake*, 932 F.2d 861, 863 (10th Cir. 1991); *United States v. Gray*, 367 F.3d 1263, 1268-69 (11th Cir. 2004). Panels of the First and Ninth Circuits have adopted this approach as well. *See, e.g., United States v. Brandon*, 17 F.3d 409, 425 (1st Cir. 1994) (bank fraud); *United States v. Green*, 745 F.2d 1205, 1207 (9th Cir. 1984); *United States v. Beecroft*, 608 F.2d 753, 757 (9th Cir. 1979).

[5] *See, e.g., Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494, 528-29 (3d Cir. 1998); *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1416 & n.3 (3d Cir. 1991); *Walters v. First Tennessee Bank, N.A.*, 855 F.2d 267, 273 (6th Cir. 1988); *Blount Financial Services, Inc. v. Heller and Co.*, 819 F.2d 151, 153 (6th Cir. 1987); *Associates in Adolescent Psychiatry, S.C. v. Home Life Insurance Co.*, 941 F.2d 561, 570 (7th Cir. 1991); *United States v. Goodman*, 984 F.2d 235, 240 (8th Cir. 1993); *United States v. Brown*, 79 F.3d 1550, 1558-61 (11th Cir. 1996).

1999). By contrast, courts that decline to extend the mail and wire fraud statutes to representations that would not deceive persons of ordinary prudence hold that "in today's society, criminal prosecution cannot be used to punish those who run promotional schemes to make money simply because some persons are more susceptible to try their luck than a more prudent recipient of the mail." *United States v. Goodman*, 984 F.2d 235, 240 (8th Cir. 1993); *see, e.g., United States v. Brown*, 79 F.3d 1550, 1560 n.18 (11th Cir. 1996). This case affords the Court an opportunity to choose between these competing approaches and to ensure that mail and wire fraud defendants nationwide receive uniform treatment.

II. THE COURT SHOULD GRANT THE WRIT BECAUSE THE COURT OF APPEALS' DECISION DISREGARDS THIS COURT'S DECISION IN *NEDER*.

The court of appeals below--like virtually all federal courts to address the "ordinary prudence" issue--disregarded the method for interpreting the mail and wire fraud statutes that this Court prescribed in *Neder* and reinforced in *Pasquantino*. *Neder* recognizes a "presumption that Congress intended to incorporate the common-law meaning of the term 'fraud' in the mail fraud, wire fraud, and bank fraud statutes," which can only be overcome by "the text or structure of the fraud statutes themselves." 527 U.S. at 23 n.7; *Pasquantino*, 125 S. Ct. at 1772-79 (examining common law revenue rule to determine scope of wire fraud statute).

The form of the "ordinary prudence" element that focuses on the diligence of the alleged victim was widely (although not uniformly) recognized at common law when Congress adopted the mail fraud statute in 1872 and the wire

fraud statute in 1952.[6] No textual or structural basis exists to rebut the presumption that Congress intended to include the common law "ordinary prudence" requirement in those statutes. Although Congress' focus on the "scheme to defraud," rather than on completed fraud, logically excludes the common law elements of actual reliance and damages, *see Neder*, 527 U.S. at 24-25, that language is not inconsistent with the "ordinary prudence" element. Under *Neder*, therefore, that element must be incorporated in 18 U.S.C. §§ 1341 and 1343 and given the meaning it had at common law. By endorsing the district court's instruction, which reduced the "ordinary prudence" element to an "argument" that the jury could "consider[]" on the issue of intent to deceive, the court of appeals' decision disregarded the interpretive approach that this Court recognized in *Neder*

[6] *See, e.g., Bianconi v. Smith*, 3 Ariz. 320, 324-45 (1892) ("[c]ommon, ordinary prudence would have suggested some investigation" into seller's title to land before buyer purchased it; buyer's fraud claim dismissed where "[t]he facilities for obtaining information relative to the title and right of possession were open to [the buyer]"); *Jones v. Foster*, 51 N.E. 862, 865 (Ill. 1898) (no actionable fraud unless alleged victim "exercises ordinary prudence and care against the deception and fraud practiced upon him"); *Wead v. Ganzhorn*, 216 Iowa 478, 480, 484, 249 N.W. 271 (1933) (affirming rejection of defense of fraud, because "the means of knowledge of the alleged fraudulent statements were equally available to both parties herein"); *Kreate v. Miller*, 11 S.W.2d 99, 101-02 (Ky. 1928) (person who signs contract without reading it cannot claim fraud unless he exercised ordinary care); *Mistal v. Mistal*, 52 N.E.2d 418, 420 (Mass. 1943) (wife cannot obtain annulment of marriage based on husband's fraud unless husband's representations would have deceived person of ordinary prudence); *Collier v. Stebbins*, 210 N.W. 264, 267 (Mich. 1926) (recognizing "ordinary prudence" principle at common law); *Lyons v. Briggs*, 14 R.I. 222, 223 (1883) ("[I]t is pretty well settled that a representation is not actionable unless it is such a one as is calculated to deceive a man of ordinary prudence."); *Costello v. Larsen*, 29 S.E.2d 856, 857-58 (Va. 1944) (citing, among other authorities, Kent's *Commentaries* and Judge Cooley's treatise on torts for the proposition that the "ordinary prudence" requirement exists at common law); *Biel v. Tolsma*, 161 P. 1047, 1048 (Wash. 1916) (affirming ordinary prudence instruction).

and applied in *Pasquantino*. In accordance with those decisions, the Court should grant the writ to provide a definitive interpretation of the mail and wire fraud statutes in light of their common law background.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 2005

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Nos. 03-6085; 03-6086; 03-6088; 03-6089

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ROBERT G. SUTHERLIN, STEPHEN L. KELLER, STERLING KEITH DRACH Defendants-Appellants.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY (Filed Dec. 21, 2004)

Before DAUGHTREY, COOK, and FARRIS,* Circuit Judges.

FARRIS, Circuit Judge. Stephen L. Keller, Robert Grant Sutherlin, and Sterling Keith Drach were convicted, following a trial to a jury, of conspiracy, mail and wire fraud, and money laundering. The defendants challenge several of the jury instructions and the admission of evidence. Drach also argues insufficiency of the evidence. We affirm.

The defendants' first claim of error is that the district court issued a "good faith belief" instruction which confused the jury and negated the defendants' advice of counsel instruction. We need not decide whether the trial

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* The Hon. Jerome Farris, United States Circuit Judge for the Ninth Circuit, sitting by designation.

court erred in giving a good faith belief instruction. *See, e.g., United States v. Janusz*, 135 F.3d 1319, 1322-23 (10th Cir. 1998) (holding that the defendant was not entitled to a good faith belief instruction because he admitted his false representations and false pretenses). The fact that the district court gave such an instruction did not deprive the defendants of the ability to advance and prevail on their theory of the case, which was that they believed in good faith, based on advice of counsel, that it was lawful to purchase and resell fraudulently obtained insurance policies.

The defendants' second claim of error is that the district court should have instructed the jury to consider the alleged fraudulent practices within the viatical insurance industry. The district court properly rejected the defendants' "viatical industry" instruction. Essentially, the defendants asked the trial court to instruct the jury that fraud may be acceptable so long as others in the business are also committing fraud. By refusing to provide the jury with the proposed industry practice instruction, the district court did not impair the defendants' theory of the case. Furthermore, the defendants' proposed instruction simply asked the jury to consider the evidence of the fraudulent practices within the viatical insurance industry, adding nothing to the general instruction that the jury consider all the evidence and give it such weight as they believed it deserved.

The defendants also contend that the district court erred by rejecting their proposed instruction concerning the "reasonably calculated to deceive persons of ordinary prudence" element of mail and wire fraud offenses. The district court properly rejected the portions of the proposed instruction requiring acquittal if "an ordinary and prudent

insurance company" would have verified the representations or if "the insurance companies were in as good a position as the defendants" to detect the misrepresentations. The defendants' proposed instruction would have impermissibly shifted the jury's focus away from the defendants' intent toward the victims' reaction to the fraud. *See, e.g., United States v. Coffman,* 94 F.3d 330, 334 (7th Cir. 1996); *United States v. Maxwell,* 920 F.2d 1028, 1037 (D.C. Cir. 1990); *United States v. Brien,* 617 F.2d 299, 311 (1st Cir. 1980).

The defendants were not entitled to a "duty to disclose" instruction because failure to disclose was not at issue. The trial court instructed the jury to base any conviction on the defendants' acts and representations (i.e., false and fraudulent pretenses, representations, or promises). Contrary to the defendants' claim, the mail and wire fraud instructions were not so broad to permit the jury to consider non-disclosures as well as affirmative misstatements.

Using the Sixth Circuit pattern instructions as his guide, the trial judge told the jury that Drach connection to the conspiracy need only be slight. In a separate instruction, the trial court told the jury that "[t]o convict any defendant, the government must prove that he knew the conspiracy's main purpose, and that he voluntarily joined it intending to help advance or achieve its goals." Explaining the elements of conspiracy, the district court instructed the jury that the government must prove "beyond a reasonable doubt" that "the defendant knowingly and voluntarily joined the conspiracy." The court also properly defined "reasonable doubt." The conspiracy instructions fit squarely within Sixth Circuit precedent. *See, e.g., United States v. Christian,* 786 F.2d 203, 211 (6th Cir. 1986).

Drach also challenges the district court's supplemental instruction to the jury based on *Allen v. United States*, 164 U.S. 492 (1896), arguing that the instruction was coercive because it referenced the need for the case to be decided in the future if the jurors did not return a verdict. Even if we assume the defendant did not waive his challenge to the court's supplemental instruction, there was no abuse of discretion in giving the *Allen* instruction, which included language (1) addressing "both those [jurors] in the majority and those in the minority" and (2) reminding the "jury that no one should surrender honest beliefs simply because others disagree." *United States v. Clinton*, 338 F.3d 483, 490 (6th Cir. 2003). The "district court's failure to use the Sixth Circuit pattern instruction, while risky, did not amount to reversible error in the context of this case." *Id.*

The defendants' next claim is that the district court erred by allowing investors to testify about the losses they incurred, thereby evoking sympathy from the jury. We find no abuse of discretion. The government was entitled to introduce proof of investor loss to prove the defendants' specific intent to defraud. *United States v. DeSantis*, 134 F.3d 760, 768 (6th Cir. 1998).

The final claim is that the evidence was insufficient to convict Drach of conspiracy to commit mail and wire fraud and conspiracy to commit money laundering. After reviewing the evidence in the light most favorable to the prosecution, we reject Drach's claim. As Chief Financial Officer of Kelco, the principal corporate entity through which the defendants operated, Drach played a pivotal role in the viatical insurance scheme. The evidence demonstrated that Drach knew about the fraudulently obtained policies, that he knew Kelco was deceiving insurance companies as

part of the fraud, and that he willfully became a member of the scheme and participated in the fraud. The evidence also supported his conviction of conspiracy to commit money laundering. He agreed to conduct financial transactions with the proceeds of mail and wire fraud to promote the ongoing fraud. Drach was responsible for receiving millions of dollars from the resale of fraudulent life insurance policies. He then used this money to pay for legitimate and illegitimate expenses.

AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CRIMINAL ACTION NO. 02-95-KSF

UNITED STATES OF AMERICA PLAINTIFF

V. ORDER

STEPHEN L. KELLER, *et. al.* DEFENDANTS

(Filed May 12, 2003)

* * * * * * * * * * * * * *

This matter is before the Court upon the following motions: defendants' joint motion for a new trial [DE #242]; defendant Drach's motion for acquittal [DE #244]; defendant Genesis' motion for acquittal [DE #245]; defendant Kelco's supplemental motion for a new trial [DE #246]. The motions are ripe for review.

I. ANALYSIS

A. JOINT MOTION FOR NEW TRIAL

The defendants base this motion on Fed. R. Crim. P. 33, providing for a new trial in the interest of justice. The motion cites three alleged errors in the jury instructions, however omits discussion of legal authority to support overturning a jury verdict solely on the basis of an incorrect instruction. Instead, a trial court's failure to give a requested jury instruction is reversible error only if the instruction is correct; not substantially covered by the actual jury charge; and so important that failure to give it substantially impairs the defendant's defense. *See, e.g., United States v. Sassak*, 881 F.2d 276, 279 (6th Cir. 1989).

For the reasons stated below and the reasons identified in the record, the Court shall deny the motion.

The duty to disclose instruction tendered by the defendants (Proposed Jury Instruction Number Ten) concerns only part of the acts alleged in the Indictment. As the following analysis indicates, the defendants are not entitled to a new trial based on proposed instruction number ten because defendants are unable to establish any of the three bases for reversal set forth in *United States v. Sassak*. The proposed instruction is incorrect and misleading because, *inter alia*, it states:

> I instruct you as a matter of law that the defendants owed no duty of disclosure to the insurance companies that issued the policies in this case. Thus, the defendants had no duty to inform the insurance companies that some insureds had lied on their insurance applications. I further instruct you that the defendants owed no duty of disclosure to the individual investors who ultimately purchased rights to the death benefits that the policies provided, except to the extent that the government has proven beyond a reasonable doubt that the defendants had a relationship of trust and confidence with those investors.

The Court did not make any rulings as a matter of law concerning duty. The defendants failed to request by way of a motion *in limine* or otherwise, a court determination as a matter of law that the defendants were without a duty of disclosure to the insurance companies or individual investors.[1] *See* Motion for New Trial, p.6 n.5 (seeking a

[1] If properly requested by motion, the Court would have conducted a pre-trial hearing, evaluating evidence in order to resolve the duty to

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court determination on the duty element, belatedly, post trial). The defendants repeatedly made the argument that individual investor evidence would be unfairly prejudicial in light of their proposed defense from *United States v. Brown*, 79 F.3d 1550, 1559 (11th Cir. 1996). However, the Court rejected the defendants' attempt to distort the "reasonably calculated to deceive persons of ordinary prudence" element in proposed instruction nine. *See infra*, pp. 7-9 (likewise rejecting the defendants' motion for a new trial on the grounds that the Court failed to give proposed instruction nine). Moreover, *Brown* has been overruled by the Eleventh Circuit during the time this case was tried, specifically on this point of law. *See United States v. Yeager*, No. 02-11265 (March 12, 2003) 2003 WL 1056598. In contrast to the thrust of the defendants' arguments, there is no requirement that a mail fraud victim be "in privity" with the defendant. Instead, the evidence concerning defendants' dealings with individual investors was relevant to the conspiracy charges and to show intent. *See, e.g., United States v. Heimann*, 705 F.2d 662, 669 (2nd Cir. 1983).

The cases cited by the defendants as authority for proposed instruction number ten are wholly inapplicable

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disclose issue. The defendants likewise failed to request a dismissal of the portions of the Indictment alleging a scheme to defraud by non-disclosures. The jury had a copy of the Indictment during deliberations; however, language in an Indictment setting forth the alleged factual predicate for the offense does not equate with jury instructions setting forth appropriate legal theories the jury must consider in reaching the decision of whether to convict. Defendants acknowledge this distinction: [I]f the prosecution intended to rely on [a] theory, it had an obligation to request an appropriate instruction." Defendants' Joint Motion for New Trial, p.4. n 4, Here, the appropriate instructions presented to the jury required a finding of false and fraudulent representations and promises for the jury to convict.

to the law and facts of this case.[3] *United States v. Szur*, 289 F.3d 200, 211-12 (2nd Cir. 2002), involved the prosecution of defendants for violations of various state law and federal law, including Travel Act counts. As *Szur* held:

> Given that four of the five wire fraud theories *presented to the jury* required the existence of a duty owed by the brokers to their customers, and the travel act counts required the existence of a fiduciary, agency, or employment relationship, in order for appellants convictions to stand, we must analyze the nature of the relationship between the brokers and their customers and determine whether the relationship between them gave rise to a duty to disclose the commissions as a matter of law and in fact.

Szur, 289 F.3d at 211 (emphasis added).

Here, unlike in *Szur*, the fraud theory presented to the jury *required* a finding of "false and fraudulent representations and promises." *See* Court's instructions, 15, 16 & 17. Thus, the instructions given by the Court permitted the jury to convict only if it found affirmative misrepresentation(s) by a defendant. *Compare Szur*, 289 F.3d 210 ("Based on these instructions, the jury could not convict the appellants of wire fraud on any of the first four theories charged in the Indictment unless it found that the relationship between the JSS brokers and their customers was such as to give rise to a duty to disclose the commissions.").

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[3] *Chiarella v. United States*, 445 U.S. 222, 228 (1980), discussed the duty to disclose in the securities fraud context and is obviously not controlling in light of the fraud allegations in this case. Likewise, *United States v. Frost*, 125 F.3d 346, 366-67 (6th Cir. 1997), the final authority cited by defendants in support of proposed instruction ten, provides no specific basis whatsoever for the proposed instruction.

Moreover, evidence indicated that the defendants in fact dealt with some investors directly. *See, e.g.*, Sterling Crum Government Exhibit 1.14, 1.22, and 46C). The record is replete with evidence of affirmative assistance and representations by the defendants to co-conspirators fraudulently dealing with investors and insurance companies. In addition, misrepresentations as well as non-disclosures were made by people conspiring with the defendants. *See, e.g.*, TR Vol. X, pp. 184-192, 196-202.

Regardless, the instructions did not provide for conviction based on failure to disclose. As acknowledged by the defendants, "[a]s to the insurance companies, the prosecution presented evidence of both affirmative misrepresentations and failures to disclose." Defendants' motion, p.2. The Court's instructions clearly informed the jury that it could convict under the mail and wire fraud counts only if it found "false and fraudulent representations and promises."[3] Thus, the instructions given by the Court permitted the jury to convict only if it found affirmative misrepresentations by the defendant. *See* Court's instructions, 15, 16 & 17. Accordingly, the Court's instructions adequately informed the jury of what facts they must find before they can convict. *See United States v. Baird*, 134 F.3d 1276, 1283 (6th Cir. 1998).

In addition, the Court provided rough draft copies of jury instructions for counsel to review overnight and to raise any objections the following day at a hearing before

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[3] The defendants' post trial objections to this instruction by way of a reply memorandum are rejected as the defendants failed to submit a proposed instruction defining representations and/or promises, and failed to object to the instruction as given by the Court.

the Court made final decisions on the instructions. The rough draft instructions provided to the parties omitted defendants' proposed instruction ten, just as the final instructions read to the jury omitted defendants' proposed instruction ten. The defendants failed to object to the Court's decision to omit proposed instruction ten. "The failure to object before the district judge to any act or omission on the part of the court generally results in a forfeiture of the objection before the court of appeals." *See, e.g., United States v. Suber*, No. 97-3375 (Oct. 16, 1998) 1998 WL 773691 (citations omitted). As for the allegedly irrelevant and prejudicial evidence concerning nondisclosure, even if the evidence were inadmissible, the failure to object, move to strike, or request a limiting instruction to otherwise improper evidence generally waives post-trial objections. *See, e.g., Metcalf v. United States*, (6th Cir. 1952).

Turning to the defendants' arguments regarding the good faith instruction, the Court is convinced that the instruction given was correct. In any event, the defendants are not entitled to a new trial as they are unable to establish reversible error based on any of the three *Sassak* elements.

As an initial matter, the defendants' proposed good faith instruction, number twenty-two, is an incorrect and misleading statement of the law. The defendants cite *United States v. Wall*, 130 F.3d 739, 746 (6th Cir. 1997), as authority for the requested instruction. However, *Wall* merely stands for the obvious, *i.e.*, that good faith is a complete defense to the specific intent crime of mail fraud. *Wall*, 130 F.3d at 746. *Wall* does not sanction any particular language for a good faith instruction, and importantly reaffirms that a defendant is only entitled to a good faith

instruction when the evidence at trial supports such an instruction. *See id.* The defendants' proposed instruction would have specifically allowed for the exoneration of a defendant acting "properly" without providing any parameters for the jury to consider in giving content to the amorphous term "properly." In essence, granting the defendants' proposed instruction would equate to a judicial imprimatur for jury nullification by permitting the jury (as well as the defendants) to provide their own definitions of "properly." In contrast, the good faith instruction given by the Court has been specifically approved by the Sixth Circuit in *United States v. Stull*, 743 F.2d 439 (6th Cir. 1984), and again in *United States v. Pohl*, 14 F.3d 603 (6th Cir. 1993).

Regardless, even if the defendants had proposed a legally correct good faith instruction, the evidence in this case does not support a good faith instruction. The defendants maintain "although they knew that the insureds had lied on their applications, they believed in good faith that they could legally buy and sell the policies." There was no evidence in this case concerning the defendants' belief – attorney argument should not be confused with evidence. The defendants did not testify, nor did other witnesses or exhibits provide evidence of the defendants' beliefs. The defendants did submit evidence that they consulted with attorneys; however, there was no evidence concerning what was told to the attorneys and what advice the attorneys actually rendered.[4] Despite the above absence of

[4] In contrast, the record is replete with evidence indicating that the defendants were not acting in good faith. For example, numerous witnesses testified to defendants' various methods for deceiving insurance companies of facts in order to not "raise a red flag." This evidence also includes the defendants' conduct in assisting others to

(Continued on following page)

evidence concerning good faith, the defense attorneys doggedly argued for a good faith advice of counsel defense, and out of an abundance of caution and fairness to the defendants, the Court gave a good faith advice of counsel instruction. The good faith advice of counsel instruction given by the Court is more generous to the defendants than the evidence in this case dictated, and fully encompassed the defendants' *arguments* on good faith.[5]

Finally, the defendants' attempt to withdraw the request for a good faith instruction came too late, only after the jury heard a good faith defense through opening statement, cross examinations, and the defense case. Moreover, most of the defendants specifically argued good faith in their closing arguments. Interestingly, the defendants' motion for a new trial acknowledges that "willfulness" and "good faith" are "opposite sides of the same coin." Defendants' Motion for New Trial, p.9. In addition, defendant Sutherlin acknowledges that his closing was in terms of willfulness. *Id.*, p.8 Accordingly, all the defendants either specifically referred to bad faith in their closings, or to willfulness, the "opposite side of the same coin." Thus, the Court's specific instruction on good faith was not in any way prejudicial, and the Court's instructions on willfulness and specific intent substantially

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provide false blood samples, and guidance to applicants in what false statements should be made to obtain policies, as well as soliciting the submission of false applications.

[5] As stated, the only *evidence* on good faith was the highly general evidence concerning defendants consulting with attorneys in regard to trusts, and the "negative inference" concerning the relatively new and unregulated viatical industry. The advice of counsel instruction encompassed this evidence fully, and the defendants were not otherwise entitled to a good faith instruction.

covered the good faith issue. *See, e.g., United States v. Tarwater*, 308 F.3d 494 (6th Cir. 2002); *Sassak*, 881 F.2d at 280.

Defendants' third and final challenge to the Court's jury instructions concerns the "*Blount* Instruction." The defendants' proposed instruction nine stated:

> As I have said, the government must prove that the fraudulent pretenses, representations, and promises were reasonably calculated to deceive persons of average prudence. Thus, the government has failed to meet its burden of proof on the "scheme or artifice to defraud" element if you conclude that an ordinary and prudent insurance company would not have merely accepted the potential insured's representations concerning his health and medical history but would have verified those matters independently. Put another way, if you conclude that the insurance companies were in as good a position as the defendants to determine the truth or falsity of the representations in the insurance applications, then you must find that the government has failed to prove the existence of a scheme or artifice to defraud.

As an initial matter, the defendants presented no evidence concerning what an ordinary and prudent insurance company would accept or not accept. Again, argument is not to be confused with evidence. In addition to the lack of evidentiary support for the proposed instruction, the Court chose to reject it independently as an incorrect and misleading statement of the law. As indicated below, the defendants' arguments fail to provide support for any of the three bases for a new trial as set forth in *Sassak*.

The defendants have cited to no Sixth Circuit authority in which the tendered instruction or a similar instruction was approved. The "reasonably calculated to deceive persons of ordinary prudence" element of mail fraud has been clarified by the Seventh Circuit subsequent to the leading Sixth Circuit cases cited by the defendants, *Blount Financial Services, Inc. v. Heller and Co.*, 819 F.2d 151 (6th Cir. 1987) (a civil case) and *United States v. Van Dyke*, 605 F.2d 220, 225 (6th Cir. 1979). This Court believes that the Seventh Circuit view on this issue, as set forth by Judge Posner in *United States v. Coffman*, 94 F.3d 330, 333 (7th Cir. 1996), does not contradict the Sixth Circuit approach, but instead provides a more detailed examination of the "reasonably calculated to deceive element" in light of the Supreme Court's teaching in *Neder v. United States*, 527 U.S. 1 (1999), decided subsequent to the Sixth Circuit's previous consideration of the element. This Court agrees with *Coffman* and the majority of circuits that have addressed this issue, that the "reasonably calculated to deceive" language is not to be taken literally, for if it were it would invite con men to prey on people of below-average judgment or intelligence, who are often targets of crimes. Instead, the "reasonably calculated" language, while certainly an element of mail fraud, has two purposes – the first relates to intent to deceive. Evidence that the scheme could fool only an idiot would tend to show that the defendants did not have the required intent to deceive, unless the scheme happened to be aimed specifically at an idiot. *Coffman*, 94 F.3d at 333. Second, the "reasonably calculated" language serves to carve a safe harbor for the type misrepresentation that is so commonplace as to be normal and thus not likely to fool anyone. (*i.e.*, puffing).

Here, the defendants do not make the puffing argument; thus, the second purpose for the "reasonably calculated" language does not come into play. The "reasonably calculated to deceive" element is relevant only to intent to deceive in this action, and the Court modified the defendants' proposed jury instruction accordingly. *See* Instruction Number 17.[6] The Court is convinced that this element of mail fraud is relevant to the extent it may shed light upon the defendants' intent, or lack thereof; however, it is not a means for a defendant to escape liability because the victim of mail fraud was stupid, inattentive, lazy, or too institutionalized or bureaucratic to catch on to the scheme. The defendants' proposed instruction, instead of focusing on intent, improperly attempts to provide a defense based on the victim's reaction to the fraud in contravention of *Neder v. United States*, 527 U.S. 1 (1999).

B. DEFENDANT DRACH'S MOTION FOR ACQUITTAL

The Court previously denied motions to acquit Drach made upon the close of the government's case and again upon the close of the defendants' case. As stated in denying the previous motions, if the Court were reviewing the evidence as the fact finder, the outcome might have been different. Indeed, as stated by the government, in comparison to the overwhelming evidence against the other defendants, it becomes somewhat tempting to usurp the role of the jury in reviewing the relatively less damning evidence against Drach. However, instead, it is well-settled in ruling

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[6] This instruction was couched in terms of the defendants' *arguments* because there was no evidence in the record of what representations a reasonably and prudent insurance company would accept or not accept.

on a motion for judgment of acquittal, the court must view the evidence and all inferences in the light most favorable to the United States. *See, e.g., United States v. Overmeyer*, 867 F.2d 937 (6th Cir. 1989); *United States v. Reed*, 821 F.2d 322 (6th Cir. 1987). The question is whether a reasonable mind might fairly find guilt beyond a reasonable doubt. *See United States v. Ashworth*, 836 F.2d 260, 263 (6th Cir. 1998).

Drach was convicted of two counts of conspiracy, in violation of 18 U.S.C. Section 371. Consistent with Sixth Circuit pattern instructions, the Court instructed the jury on the three elements to conspiracy: 1. The agreement; 2. That the defendant knowingly and voluntarily joined the conspiracy; and 3. An overt act. The defendant argues that no reasonable jury could have concluded that he knowingly and voluntarily joined the conspiracy. The government's response to the motion for a new trial sets forth some of this evidence against Drach concerning his knowledge and participation in the crimes. The Court recalls more than sufficient evidence presented at trial to convict Drach of the conspiracy counts, when construed in the light most favorable to the government. The defendants' memorandum provides lengthy citations to appellate courts questioning whether the government had proved that the defendant in that case had knowledge of the conspiracy. However, here, Drach's counsel conceded at trial that Drach knew Kelco was buying and selling fraudulently obtained life insurance policies.

C. DEFENDANT GENESIS' MOTION FOR ACQUITTAL

Genesis complains that it is referred to as a corporation six times in the Indictment, rather than the limited

liability company it claims to be. However, the Indictment in this case correctly states that "Genesis" operated as both a corporation and a limited liability company "at all times material to this Indictment." Accordingly, the Indictment sufficiently informed Genesis of the basis elements of the offenses and the charges against which it must defend. *See, e.g., United States v. Martinez*, 981 F.2d 867 (6th Cir. 1993), *cert. denied*, 507 U.S. 1041 (1993); *Russell v. United States*, 369 U.S. 749, 763-64 (1962); *United States v. Mohney*, 949 F.2d 899 (6th Cir. 1991). Likewise, the Court's instruction number twenty-two adequately sets forth that Genesis operated as both a corporation and a limited liability company, but could only be found guilty of the criminal offenses through the acts of its directors, officers, agents, employees, and other persons authorized or employed to act for it. Genesis Viatical had adequate notice of the charges against it; had a meaningful opportunity to defend against those charges at trial; and is thus unable to show prejudice. *Cf. United States v. Emuegbunem*, 268 F.3d 377 (6th Cir. 2001), *cert. denied*, 122 S.Ct. 1450 (2002); *United States v. Wilkerson*, 456 F.2d 57, 59 (6th Cir. 1972).

D. DEFENDANT KELCO'S SUPPLEMENTAL MOTION FOR A NEW TRIAL

Kelco argues that the government introduced evidence illegally seized during a May 19, 2000, search of its offices. The arguments made in the instant motion are identical to those made in a pre-indictment motion to suppress. The Court previously considered and rejected Kelco's arguments in an opinion and order dated November 16, 2001. Accordingly, the Court shall incorporate that opinion as if set out in full in denying Kelco's motion.

II. CONCLUSION

The Court, being fully advised, HEREBY ORDERS

(1) Defendants' joint motion for a new trial [DE #242] is DENIED;

(2) Defendant Drach's motion for acquittal [DE #244] is DENIED;

(3) Defendant Genesis' motion for acquittal [DE #245] is DENIED;

(4) Defendant Kelco's supplemental motion for a new trial [DE #246] is DENIED.

This 12th day of May, 2003.

/s/ Karl S. Forester
KARL S. FORESTER,
CHIEF JUDGE

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Nos. 03-6085/6086/6088/6089

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ROBERT GRANT SUTHERLIN, STEPHEN L. KELLER, and STERLING KEITH DRACH, Defendants-Appellants.	)	ORDER ON PETITION TO REHEAR (Filed May 31, 2005)

Before: DAUGHTREY, COOK, and FARRIS,* Circuit Judges.

The defendants have filed a joint petition to rehear, raising two grounds upon which they contend that the panel's decision in this case should be reconsidered. They argue, first, that our rulings on the district court's jury instructions on "ordinary prudence" and on the jury's obligation to return a verdict if possible (the so-called "*Allen* charge") conflict both with previous decisions of this court and with those of the United States Supreme Court.

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* Hon. Jerome Farris, Senior United States Circuit Judge for the Ninth Circuit Court of Appeals, sitting by designation.

** Judge Sutton recused himself from participation in this ruling.

We find no merit to this claim. Their second contention, however, does require further consideration.

After briefing was concluded in this appeal, but before oral argument, defendant Sutherlin filed a supplemental brief challenging his sentence based on the Supreme Court's opinion in *Blakely v. Washington*, 542 U.S. ___, 124 S.Ct. 2531 (2004), an argument that was subsequently adopted by his co-defendants, Keller and Drach. The analysis in *Blakely*, affecting state sentencing provisions, was subsequently extended to the federal sentencing statute and guidelines in *United States v. Booker*, ___ U.S. ___, 125 S.Ct. 738 (2005). As a result, we have subsequently held that sentencing challenges not timely raised in the district court are nevertheless subject to review on appeal under the plain error doctrine. *See United States v. Oliver*, 397 F.3d 369, 380-81 (6th Cir. 2005) (plain error review of Sixth Amendment violation); *United States v. Barnett*, 398 F.3d 516, 530 (6th Cir. 2005) (plain error review of mandatory application of the sentencing guidelines). It is clear that the sentences imposed in this case, based on an amount of loss calculated by the district court on facts not found by the jury and enhanced on the basis of what the district court assumed were mandatory provisions of the sentencing guidelines, must be vacated and the cases remanded for re-sentencing under *Booker*, *Oliver*, and *Barnett*. To the extent that our original opinion failed to take this aspect of the appeal into consideration, it is superceded by the instant remand order.

The district court's sentencing orders are VACATED and the cases are REMANDED for further proceedings in conformity with this order.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk
[Illegible initials]

United States District Court
Eastern District of Kentucky
At Lexington

UNITED STATES OF AMERICA,	)	
	)	
vs.	)	Lexington Criminal
	)	Action No. 02-95
STEPHEN L. KELLER	)	
ROBERT GRANT SUTHERLIN	)	Lexington, Kentucky
STERLING KEITH DRACH	)	March 13, 2003
KELCO, INCORPORATED	)	9:00 a.m.
GENESIS VIATICAL, INC.	)	

VOLUME XIII
TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE
KARL FORESTER, AND A JURY

Appearances of Counsel:

On behalf of the United States:
DAVID GRISE, ESQ.
PATRICK H. MOLLOY, ESQ.
ROBIN GWINN, ESQ.
KAREN TAYLOR, ESQ.

On behalf of the Defendant Stephen L. Keller:
ROBERT W. TARUN, ESQ.
CHRISTOPHER MCCLELLAN, ESQ.

On behalf of the Defendant Robert Grant Sutherlin:
JOHN D. CLINE, ESQ.

On behalf of the Defendants Sterling Keith Drach and Genesis Viatical, Inc.:
JAMES A. SHUFFETT, ESQ.

On behalf of the Defendant Kelco, Incorporated:
R. BURL MCCOY, ESQ.
CHARLES BEAL, ESQ.

Court Reporter: CYNTHIA A. OAKES, CRR
Official Court Reporter

Proceedings recorded by mechanical stenography, transcript produced by computer.

* * *

[6] take the test. So we can either wait for a while, or we can have Ms. Lear.

MR. TARUN: I would like to wait.

MR. MOLLOY: No objection, Your Honor.

MR. SHUFFETT: Just wait, I guess.

THE COURT: She has called in, so we should get word from her shortly one way or the other. She was having some sort of hemorrhage problem, so the doctor may tell her to go home or put her in the hospital.

(Whereupon, the following proceedings continued in open court.)

THE COURT: While we're waiting, because we were in a rush yesterday with regard to some of the instructions, I don't know that I gave you the basis for my rulings. I'll go ahead and do that now.

With regard to the tendered Instruction 19 – I think Mr. Cline tendered that instruction – subsequent to the *Blount* and *Van Dyke* cases, the Seventh Circuit, in the *Coffman* case, clarified, I think, the elements relating to the mail fraud allegations. And, there, a detailed examination of the "reasonably calculated to deceive" element is set out. And the Court would agree with the reasoning of the *Coffman* case, that's the Seventh Circuit case, and the reasoning of the other circuits which have adopted the

Coffman reasoning. And, there, it is generally held that the [7] "reasonably calculated to deceive" language is not to be taken literally. If it were, it would invite con men to prey upon individuals who are of low intelligence who are often the targets of crimes.

Instead, the "reasonably calculated" language, while certainly an element of mail fraud, has two purposes. The first relates to the intent to deceive. Evidence that the scheme could fool only a person of low intelligence would tend to show that the defendants did not have the required intent to deceive unless the scheme was aimed at a person of low intelligence. And, secondly, the "reasonably calculated" language would serve to carve a safe harbor for common misrepresentations which would not likely be calculated to fool anybody. You sort of think about the puffing-type situations, and, here, the defendants do not make that sort of argument, the puffing argument. So the second purpose does not come into play. So the "reasonably calculated to deceive" element is relevant only to intent to deceive in this action, and that's why I modified the defendants' tendered instruction.

And the Court is firmly convinced that this element of mail fraud is relevant to the extent that it may shed light upon the defendants' intent or lack thereof, and it is not a means for a defendant to escape liability because the victim of mail fraud was stupid, inattentive, lazy, too [8] institutionalized or bureaucratic to catch onto the scheme.

And the Court believes that the defendants' proposed instruction, instead of focusing on intent, does not properly provide – or that the Court should not instruct the jury to where there could be a defense based upon a

defendant's reaction to a fraud. So that's the reasoning there.

On the instruction which was tendered – and I don't have the number on it – on the industry practice, the good-faith aspect, I rejected that instruction. The federal law determines good faith and not industry practice. So that is the reason I rejected the industry practice instruction.

Do we know if the juror is here yet?

MR. MARSHAL: No.

MR. GRISE: Your Honor, while we're waiting, I would like to bring up a situation about the equipment in the courtroom. Once the jury retires, may we have the Court's permission to have access to the courtroom to take down the audio visual equipment? We need to return the large screen monitors to Judge Reeves in London, as well. And do you think we ought to keep this while the jury is retiring in case they need to see something on it, or would you like us to disassemble the equipment?

THE COURT: Well, the jury has the exhibits. I can't think of anything they might want to see using this equipment.

* * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CRIMINAL ACTION NO. 02-95-KSF

UNITED STATES OF AMERICA PLAINTIFF

VS. **JURY INSTRUCTIONS**

(Filed Mar. 14, 2003)

STEPHEN L. KELLER
ROBERT GRANT SUTHERLIN
STERLING KEITH DRACH
KELCO, INCORPORATED
GENESIS VIATICAL,
INCORPORATED DEFENDANTS

* * * * * * * * * * *

MEMBERS OF THE JURY:

Now it is time for me to instruct you about the law that you must follow in deciding this case.

I will start by explaining your duties and the general rules that apply in every criminal case.

Then I will explain the elements, or parts, of the crimes that the defendants are accused of committing.

* * *

INSTRUCTION NO. 16

The first element the government must prove beyond a reasonable doubt is that there was a scheme or artifice to defraud insurance companies and investors of money or property by means of false or fraudulent pretenses, representations, or promises.

A "scheme or artifice" is a plan for the accomplishment of any object.

A scheme to defraud is any plan, device, or course of action to obtain money or property by means of false or fraudulent pretenses, representations, or promises reasonably calculated to deceive persons of average prudence.

The scheme to defraud charged in Counts 1 through 23 is alleged to have been carried out by making false and fraudulent representations and promises. A representation is false if it is untrue when made and was then known to be untrue by the person making it or causing it to be made. A representation is fraudulent if it was falsely made with the intention to deceive.

The government must also prove beyond a reasonable doubt that the allegedly false and fraudulent pretense, representation, or promise at issue in the count under consideration was material. A matter is material if a reasonable person would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question; or if the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable person would not so regard it.

INSTRUCTION NO. 17

As I have said, the government must prove that the fraudulent pretenses, representations, and promises were reasonably calculated to deceive persons of average prudence. The defendants have argued that an ordinary and prudent victim should not have merely accepted the

potential insured's representations concerning his health and medical history but would have verified those matters independently. If you find this argument persuasive in light of the evidence in the case, it may be considered to determine whether the defendants had the intent to deceive required for this crime as previously explained to you in these instructions.

INSTRUCTION NO. 18

The second element which the government must prove beyond a reasonable doubt is that the defendant participated in the scheme to defraud knowingly, willfully, and with specific intent to defraud.

"Knowingly" means to act voluntarily and deliberately, rather than mistakenly or inadvertently.

"Willfully" means to act knowingly and purposely, with an intent to do something the law forbids; that is to say, with bad purpose either to disobey or to disregard the law.

"Intent to defraud" means to act knowingly and with the specific intent to deceive, for the purpose of causing some financial or property loss to another.